Internal Revenue Service

memorandum

CC:TL-N-5541-88
Br2JMPanitch

date: JUL 18 1988

to: District Counsel, San Francisco CC:SF
Attn: Lin Murphy

from: Director, Tax Litigation Division CC:TL

subject: [redacted]

The following analysis responds to your request for technical advice, dated April 14, 1988.

ISSUES

1. Whether a fruit tree operation known as the [redacted] which is organized under a cotenancy agreement, is a "partnership" as that word is used in I.R.C. §§ 7701(a)(2) and 761(a). [1]

2. Whether the [redacted] is a "partnership" as that word is used in section 6231; and, thus, whether the Service must comply with the TEFRA partnership provisions under sections 6221-6233.

3. Whether the Service should assert the delinquency penalty under section 6698.

CONCLUSION

The [redacted] appears to be a "partnership" as that word is used in sections 7701(a)(2) and 761(a). Furthermore, the [redacted] appears to be a "partnership" as that word is used in section 6231. The section 6698 penalty applies to a partnership and not to the individual partners. Thus, the Service should move to dismiss for lack of jurisdiction the issue involving adjustments attributable to the [redacted] receipt of credit and loss pass-throughs from the [redacted] and should initiate TEFRA audit procedures at the partnership level.

---

[1] All section references are to the Internal Revenue Code as in effect during the year in issue ([redacted]), unless otherwise stated.

DISCUSSION

Facts:

On [redacted], petitioner and [redacted] others bought a [redacted] acre parcel of land which was located [redacted] California, and was devoted to the production of tree fruit. Petitioner received an undivided [redacted] interest in the parcel. On [redacted], the buyers organized their fruit tree operation--the [redacted]--under a cotenancy agreement. [2]

On their joint federal income tax returns for the taxable year [redacted] petitioners claimed an investment tax credit and certain deductions attributable to their ownership interest in the parcel during the [redacted] taxable year. The Service disallowed the deductions and credits based upon the valuation reached in an engineering report. Upon receiving a 90-day letter, taxpayer petitioned the Tax Court for a redetermination.

After the case was in docketed status, the Fresno Appeals Office recognized certain defects in the engineering report. Due to the Fresno Appeals Office's view of the valuation question, the Service initially indicated a willingness to settle the issue. Less than a week before trial, however, the Appeals Officer handling the case informed both the District Counsel's office and the petitioners' counsel of the existence of a new theory to support the disallowance. The Appeals Officer asserted the following: 1) the cotenancy agreement resulted in the classification of the entity as a partnership; 2) since the entity constituted a partnership for federal tax purposes, the $125,000 limit on qualified investment in used section 38 property [Section 48(c)(2)(A)] applied at the partnership level and not at the level of the individual partners. [Section 48(c)(2)(D)]; 3) The cost of the used section 38 property exceeded $125,000; 4) Thus, the partnership was limited to $125,000 qualified investment in used section 38 property; and 5) Therefore, the total credit allowable to the partners was $[redacted], of which, petitioners' share was $[redacted].

Analysis:

Issue 1. *Whether a fruit tree operation known as the* [redacted], *which is organized under a cotenancy agreement, is a "partnership" as that word is used in I.R.C. §§ 7701(a)(2) and 761(a).*

---

[2] We incorporate specific portions of the cotenancy agreement into the legal analysis as necessary.

The classification of an organization for federal income tax purposes is controlled by section 7701(a). [3] Section 7701(a)(2) provides in pertinent part:

> PARTNERSHIP AND PARTNER -- The term "partnership" includes a syndicate, group, pool, joint venture or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust, or estate or a corporation;....

Treas. Reg. § 301.7701-1(b) provides that the Internal Revenue Code controls the classification of an organization for federal income tax purposes and refers to Treas. Reg. §§ 301.7701-2 through -4 for the standards to be applied in determining whether an organization is a trust, partnership or corporation under the Code. Treas. Reg. § 301.7701-3(a) further interprets the word "partnership" as it is used in section 7701(a)(2):

> In general. The term "partnership" is broader in scope than the common law meaning of partnership and may include groups not commonly called partnerships....
>
> A joint undertaking merely to share expenses is not a partnership. For example, if two or more persons jointly construct a ditch merely to drain surface water from their properties, they are not partners. Mere co-ownership of property which is maintained, kept in repair, and rented or leased does not constitute a partnership. For example, if an individual owner, or tenants in common, of farm property lease it to a farmer for a cash rental or a

---

[3] Although state law is relevant to our inquiry, federal law overrides. The Internal Revenue Code sets the criteria to apply in classifying an organization for purposes of the federal income tax. Estate of Kahn v. Commissioner, 499 F.2d 1186 (2nd Cir. 1974), aff'g T.C. Memo. 1972-240; Luna v. Commissioner, 42 T.C. 1067, 1077 (1964); Treas. Reg. § 301.7701-1(c). See Commissioner v. Tower, 327 U.S. 280, 287-88 (1946). Local law is relevant, however, to ascertain whether legal relationships exist which satisfy the federal criteria. Treas. Reg. § 301.7701-1(c).

> share of the crops, they do not necessarily create a partnership thereby. Tenants in common, however, may be partners if they actively carry on a trade, business, financial operation, or venture and divide the profits thereof. For example, a partnership exists if co-owners of an apartment building lease space and in addition provide services to the occupants either directly or through an agent.

Thus, Treas. Reg. § 301.7701-3(a) creates a general analytical framework for classifying the [redacted] for federal income tax purposes. If the [redacted] cotenants merely maintained, kept in repair and rented or leased the [redacted], then the [redacted] did not constitute a "partnership" as that term is used in section 7701(a)(2). If, however, the [redacted] cotenants actively carried on a trade, business, financial operation or venture and divided the profits thereof, then the [redacted] may [4] constitute a "partnership" for purposes of section 7701(a)(2). "While all circumstances are to be considered, the essential question is whether the parties intended to, and did in fact, join together for the present conduct of an undertaking or enterprise." Commissioner v. Culbertson, 337 U.S. 733, 741-42 (1949); Luna v. Commissioner, 42 T.C. 1067, 1077 (1964).

In Luna, Mr. Luna, a life insurance salesman, received $45,000 in discharge of an insurance company's obligation to pay him renewal commissions. Mr. Luna reported the payment as capital gain attributable to the sale of his contract with the life insurance company. Respondent determined that the $45,000 should have been reported as ordinary service income and sent petitioner a statutory notice. Mr. Luna petitioned the Tax Court for a redetermination.

In the Tax Court, Mr. Luna argued that he and the insurance company were joint venturers, pursuant to 3797(a)(2) of the Internal Revenue Code of 1939 (predecessor to § 7701(a)(2) and section 761(a) of the 1954 Code [5]), and that he had sold his interest in the venture for $45,000. Mr. Luna contended that the

---

[4] It may, however, constitute an "association" as that term is used in section 7701(a)(3). See discussion below. pp. 9-12.

[5] Section 761 and Treas. Reg. § 1.761-1(a) contain language which is substantially identical to Section 7701(a)(2) and language contained in Treas. Reg. § 301.7701-3(a), respectively. The relevant language of Section 3797(a)(2) of the Internal Revenue Code of 1939 was carried forward into sections 7701(a)(2) and 761(a) of the 1954 Code without change.

sale of his interest in the joint venture gave rise to capital gain.

In addressing Mr. Luna's argument, the Tax Court set forth eight factors which were material to the determination of the existence of a "partnership" as that term was used in section 3797(a)(2):

> 1. The agreement of the parties and their conduct in executing its terms;
>
> 2. The contributions, if any, which each party has made to the venture;
>
> 3. The parties' control over income and capital and the right of each to make withdrawals;
>
> 4. Whether each party was a principal and coproprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one party was the agent or employee of the other, receiving for his services contingent compensation in the form of a percentage of income;
>
> 5. Whether business was conducted in the joint name of the parties;
>
> 6. Whether the parties filed federal partnership returns or otherwise represented to respondent or to persons with whom they dealt that they were joint venturers;
>
> 7. Whether separate books of account were maintained for the venture; and
>
> 8. Whether the parties exercised mutual control over and assumed mutual responsibilities for the enterprise.

Id., at pp. 1077-78. [6]

---

[6] Numerous cases, including Luna, apply the Luna factors to specific fact patterns. E.g., Estate of Kahn v. Commissioner, 499 F.2d 1186, 1189-90 (2d Cir. 1974), aff'g T.C. Memo. 1972-240; Robinson v. Commissioner, 44 T.C. 20, 34-35 (1965). Furthermore, it is Service position to apply the Luna factors to determine whether a partnership exists for federal income tax purposes. Rev. Rul. 82-61, 1982-1 C.B. 13, 15-16; Rev. Rul. 75-43 1975-1 C.B. 383, 383-84. There are revenue rulings which determine whether an organization is a "partnership" for purposes of

(continued...)

We will apply the Luna factors to the [redacted] cotenancy agreement to classify the [redacted] for federal income tax purposes. [7]

1. The agreement of the parties and their conduct in executing its terms.

The [redacted] cotenants clearly did not intend to create a "partnership" for federal tax purposes. The cotenancy agreement contains a partnership disclaimer and states that "[t]he tenants shall execute any and all elections and other documents necessary under the Internal Revenue Code of 1954, as amended, to negate the creation of any tax partnership or farm syndicate under the provisions of this agreement." (Section 1.3, p.2) That the Tenants expressed an intent not to be treated as partners for federal tax purposes is of little consequence. Individuals may constitute a partnership for tax purposes even though they expressly disclaim any intention to enter into a partnership relation. Baughn v. Commissioner, T.C. Memo. 1969-282. Despite the cotenants' stated intent not to create a partnership under the Internal Revenue Code, the [redacted] cotenancy agreement manifests the parties' desire to organize themselves as owner-operators of a working farm. (Page 1, 4th paragraph; Section 1.1, pp. 1-2; Section 2.1, p. 3; Section 3.1, pp. 7-8).

2. Contributions by the parties to the venture.

Pursuant to the agreement, each cotenant contributed his [redacted] undivided interest in the property to the [redacted] operation. In section 2.6 of the agreement, the parties agreed to surrender their right to partition any part of the [redacted] property. The extent to which each of the parties contributed his services should be the subject of further discovery.

---

[6](...continued)
section 7701(a)(2) without resorting to the Luna factors. Rev. Rul. 68-344, 1968-1 C.B. 569; Rev. Rul. 64-220, 1964-1 C.B. 335. However, the Luna factors appear to be simply a more detailed inquiry into the tests of "associates" and "an objective to carry on business and divide the gains therefrom" found in Treas. Reg. § 301.7701-2(c). We will apply the Luna factors herein, since Luna is well-settled law; the later revenue rulings follow Luna; and the inquiry in the later revenue rulings is more detailed than (and yet substantively consistent with) the inquiry in the earlier revenue rulings.

[7] We note that no inquiry has yet been made into the manner in which the parties carried out their obligations under the cotenancy agreement. Such an inquiry is relevant to the application of the Luna factors, and you may need to conduct additional discovery to acquire this information.

3. The parties' control over income and capital and the right of each to make withdrawals.

The agreement contemplates that "all decisions relating to matters not arising in the ordinary course of business ... shall require the concurrence of all the Tenants." (Section 2.1, p. 3) The tenants agreed to relinquish their rights to partition the property. (Section 2.6, p. 7). The tenants have severely restricted their right to sell, assign, transfer, exchange, mortgage, pledge or grant a security interest in the property or any part thereof. (Articles IV and V, pp. 8-12) The agreement reserves to the Tenants the right to make all decisions involving the operating and management of the farm. (Section 3.1, pp. 7-8) There is no indication that the tenants had any right to make withdrawals, although the agreement requires a distribution of net cash flow to the tenants in their proportionate interests. (Sections 2.4 and 3.3, pp. 4 and 8, respectively) The frequency of these distributions is not stated.

4. Whether each person was a principal and coproprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one party was the agent or employee of the other receiving for his services contingent compensation in the form of a percentage of income.

The agreement requires the Manager to distribute the net cash flow to the tenants in proportion to their interest. (Section 2.4, p. 4) Any net balance leftover when the agreement terminates will be distributed to the tenants equally, and the tenants will be required to incur any net deficit equally (Section 6.3, p. 13). No agency arose out of the coowners' status as cotenants, See Lander v. Wedell, 493 S.W. 2d 271, 273 (Tex. Civ. App. 1973), or out of the agreement. (Section 1.3, p. 2)

5. Whether business was conducted in the joint names of the parties.

The tenants did not conduct the business in their individual names, but, rather, conducted business jointly as the [redacted].

6. Whether the parties filed federal partnership returns or otherwise represented to respondent or to persons with whom they dealt that they were partners.

We assume that the Tenants did not file federal partnership returns. There is no evidence that they represented to respondent or to persons with whom they dealt that they were partners. That the Tenants never held themselves out to the public as partners in a venture is of little consequence. Individuals may constitute a partnership for tax purposes even though they

expressly disclaim any intention to enter into a partnership relation. Baughn v. Commissioner, T.C. Memo. 1969-282.

7. Whether separate books of account were maintained for the operation.

The agreement requires the farm manager to keep separate books of account and records for the tenants as tenants in common. The Tenants have the right to audit, examine and make copies or abstracts from these books.

8. Whether the parties exercised mutual control over and assumed mutual responsibilities for the enterprise.

The agreement reserves the Tenants' rights "to make all decisions involving the operation and management of the farm, the hiring and discharging of employees of the farm manager assigned to work on the property, and exercising such other control over the farming operation as is normally exercised by farmers of similar property". (Section 3.1, pp. 7-8) Whether or not, in practice, the tenants actually exercised this right and responsibility is unknown and should be developed further.

Where, as here, it appears that the parties organized themselves as owner-operators of a working farm; the parties each contributed capital in direct proportion to their undivided interests; the tenants retained the right to make all decisions involving the operation and management of the farm; each tenant had a proportionate interest in the organization's profits and was liable for his or her share of the losses; separate books of account were kept for the farm operation; and the tenants were all responsible for making the decisions normally exercised by farmers of similar property, we conclude that the [redacted] is a "partnership", as that term is used in section 7701(a)(2).[8] We reach this conclusion notwithstanding that the cotenants did not intend to create a partnership under the Internal Revenue Code; none of the cotenants has the power to bind the others contractually; the Tenants probably did not file federal partnership returns; and there is no evidence that they represented to respondent or to persons with whom they dealt that they were partners.

---

[8] We reiterate that this inquiry should be fine-tuned by further investigation into both the manner in which the Tenants actually carried out the agreement and Texas law governing cotenancy agreements. We note, also, that the agreement refers to the existence of a Farm Management Agreement. (Section 3.1, pp. 7-8) This agreement would presumably aid in our understanding of how the cotenants planned to operate the [redacted].

Our analysis does not end here, however. Section 7701(a)(3) provides:

> CORPORATION. - The term "corporation" includes associations, joint stock companies, and insurance companies.

In defining the term "association", as it is used in section 7701(a)(3), Treas. Reg. § 301.7701-2(a) sets forth six corporate characteristics:

1) associates;

2) an objective to carry on business and divide the gains therefrom;

3) continuity of life;

4) centralization of management;

5) liability for corporate debts limited to corporate property;

6) free transferability of interests.

"Associates" and "an objective to carry on business and divide the gains therefrom" are common to partnerships and corporations. Treas. Reg. § 301.7701-2(a)(2). Thus, the determination of whether an organization which has these characteristics more closely resembles a corporation than a partnership depends on whether the organization has continuity of life, centralization of management, liability for corporate debts limited to corporate property, and free transferability of interests. Id. Here, if the [redacted] possesses a majority (three) of the corporate characteristics uncommon to partnerships, then the [redacted] will be taxable as a corporation. See Rev. Rul. 64-220, 1964-1 C.B. 335.

1. Continuity of Life - The [redacted] cotenancy lacks continuity of life, because the bankruptcy, arrangement, etc. of any of the cotenants would immediately terminate the agreement. (Section 6.2, pp. 12-13) Treas. Reg. § 301.7701-2(b)(1).

2. Centralization of Management - Although the parties agreed to hire a farm manager for the day to day management and operation of the [redacted], the parties reserved the right to make all decisions involving said operation and management (Section 2.1, p. 3; section 3.1, pp. 7-8). The agreement provides that no party "shall have the authority to act for, or to assume any

obligations or responsibility on behalf of any other party," except as otherwise provided. (p. 2, section 1.3). The agreement does not appear to "otherwise provide."

Treas. Reg. § 301.7701-2(c) provides in pertinent part:

> (1) An organization has centralized management if any person (or any group of persons which does not include all the members) has continuing exclusive authority to make the management decisions necessary to the conduct of the business for which the organization was formed ....
>
> ****
>
> (3) Centralized management means a concentration of continuing exclusive authority to make independent business decisions on behalf of the organization which do not require ratification by members of such organization. Thus, there is not centralized management when the centralized authority is merely to perform ministerial acts as the agent.

The farm manager does not have continuing exclusive authority to make independent business decisions on behalf of the organization, since the parties have reserved their right to make all decisions involving said operation and management. Furthermore, none of the cotenants has the power to bind the others contractually. See Lander v. Wedell, 493 S.W. 2d 271, 273 (Tex. Civ. App. 1973). Thus, the agreement lacks centralization of management. See Rev. Rul. 64-220, 1964-1 C.B. 345.

3. Liability For Corporate Debts Limited to Corporate Property - Whether the [redacted] had the corporate characteristic of limited liability for its members is a matter of state law. We have found no Texas or California law limiting the liability of cotenants to third parties. While Lander v. Wedell holds that cotenants do not have the power to bind each other contractually under Texas law unless said power is specifically granted, it seems to be a matter of common sense that a cotenancy agreement will not shield its signatories from liability to third parties arising out of the ratified acts of the cotenancy. Thus, we assume that the cotenants had unlimited liability.

4. Free Transferability of Interest - Treas. Reg. § 301.7701-2(c) provides in pertinent part:

> Free Transferability of Interest. (1) An organization has the corporate characteristic of free transferability of interests if each of its members or those members owning substantially all of the interests in the organization have the power, without the consent of other members, to substitute for themselves in the same organization a person who is not a member of the organization ....
>
> (2) If each member of an organization can transfer his interest to a person who is not a member of the organization only after having offered such interest to the other members at its fair market value, it will be recognized that a modified form of free transferability exists. In determining the classification of an organization, the presence of this modified corporate characteristic will be accorded less significance than if such characteristic were present in unmodified form.

The [redacted] cotenancy agreement requires a tenant who wishes to sell his interest to give notice of his intent to the other tenants. The other tenants have both a "right of first refusal" and veto power over the sale. The other tenants may not unreasonably withhold their consent, but a tenant will not have unreasonably withheld his consent if his veto is based on either the financial and business reputation of the prospective acquirer or the vetoing tenant's compatibility with the prospective acquirer. (Section 4.2, pp. 8-9; section 5.1, p. 10) We are unable to determine the effect of the veto provisions under state law. If the Texas courts would uphold the provisions and give them literal effect, then the [redacted] would lack free transferability of interests because of the absolute discretion to veto contained in the compatibility clause. If the Texas courts were to invalidate the clause, however, or interpret it to afford the cotenants limited discretion, then a modified form of free transferability might exist.

In Larson v. Commissioner, 66 T.C. 159, 182-83 (1976), the Tax Court addressed the issue of free transferability in the context of limited partnership agreements which contained a right of first refusal and prohibited the assignment of a limited partner's income interest without the general partner's consent. The agreement provided that the general partner was not permitted to withhold consent to a transfer unreasonably, however. Petitioners therein suggested no ground upon which consent could be

withheld. The court appeared to hold that the limited partnership interests were freely transferable, but then reduced this holding to dictum by stating that even if the court had found that the limited partners' interests possessed only a modified form of free transferability, petitioners would still prevail, because there would be two factors favoring partnership status and somewhat less than two factors favoring corporate status. [9]

Unlike Larson, the cotenancy agreement herein itself suggests two grounds upon which consent can be withheld (compatibility and financial and business reputation of transferee). Given the difficulty in determining the degree of precedential weight to accord Larson, we can only point out that it does not control the outcome of the present case, although it has some relevance. We need not pinpoint the answer to this issue, though, because the [redacted] appears to lack centralization of management, limited liability and continuity of life. Therefore, since the [redacted] appears to lack at least three out of four of the distinguishing corporate characteristics, the [redacted] is not an association taxable as a corporation, but, rather, is a partnership, for federal tax purposes.

The [redacted] cotenants clearly did not intend to create a partnership for federal tax purposes. The cotenancy agreement contains a partnership disclaimer and states that "[t]he tenants shall execute any and all elections and other documents necessary under the Internal Revenue Code of 1954, as amended, to negate the creation of any tax partnership or farm syndicate under the provisions of this agreement." (Section 1.3, p.2) Section 761(a) gives the Secretary discretion under certain circumstances to exclude unincorporated organizations from the application of subchapter K. Whether or not the cotenants filed an election under section 761, the limitation on the amount of qualified investment in used section 38 property used to compute the investment credit applies at the organizational level and not at the level of the individual constituents. Bryant v. Commissioner, 46 T.C. 848, 862-864 (1966), aff'd, 399 F.2d 800 (5th Cir. 1968); Rev. Rul. 65-118, 1965-1 C.B. 30. [10]

---

[9] The court's opinion evinces some confusion since it suggests that the existence of free transferability of interests, a corporate characteristic, would favor petitioners. Petitioners, however, were arguing for partnership status. The Court probably intended to indicate only that regardless of whether it found the existence of free transferability or modified free transferability, petitioners would prevail.

[10] The existence of an election under section 761 is a material issue of fact which you should investigate. See footnote 11, below.

Issue 2. *Whether the* [redacted] *is a "partnership" under section 6231; and, thus, whether the Service must comply with the TEFRA partnership provisions under sections 6221-6233.*

Section 6231(a)(1) defines the term "partnership" for purposes of the TEFRA partnership provisions as any partnership required to file a return under section 6031(a) [11], excluding any partnership of ten or fewer partners, where each partner's share of each partnership item is the same as his share of every other item. Your incoming request indicates that at the end of [redacted], there were [redacted] cotenants. If this is so, then the small partnership exception does not apply herein.

The TEFRA partnership provisions became effective for any partnership taxable year beginning after September 3, 1982. Section 402(a), Pub. Law 97-248, 96 Stat. 648. When the [redacted]'s partnership taxable year began is a factual issue. For an analysis of this issue, see Frazell v. Commissioner, 88 T.C. 1405 (1987); Sparks v. Commissioner, 87 T.C. 1279 (1986); and Grossman v. Commissioner, T.C. Memo. 1988-278. Since you state in your incoming request that the [redacted] cotenants did not buy the [redacted] until [redacted] and did not sign the cotenancy agreement until on or about [redacted], we will proceed on the assumption that the [redacted]'s first taxable year began after September 3, 1982. [12]

Assuming that the [redacted]'s first taxable year began after September 3, 1982, then the [redacted] is a "partnership" as that term is defined in section 6231(a) and used throughout sections 6221-6233. The Service may not assess the accounts of the individual partners of a TEFRA partnership for any partnership item without first complying with the TEFRA audit procedures and sending the partners a final partnership administrative adjustment (FPAA). Sections 6223(a)(2) and 6225(a).

---

[11] We note that, for purposes of this analysis, we are assuming that, despite the provision in the cotenancy agreement calling for the partners to file any elections under the Internal Revenue Code to negate the creation of a partnership for tax purposes, the cotenants did not elect out of subchapter K pursuant to section 761(a). If the partners did file such an election, please let us know, so that we may determine what, if any, consequences follow.

[12] If, however, in developing your case, you discover other facts which in light of Frazell, Sparks and Grossman indicate that the [redacted]'s first taxable year began before September 3, 1982, then the [redacted] would not be a TEFRA partnership. Accordingly, you should proceed with your case against [redacted] individually.

Thus, the Service should move to dismiss for lack of jurisdiction the issue involving adjustments attributable to the [redacted] receipt of credit and loss pass-throughs from the [redacted] and should initiate TEFRA audit procedures at the partnership level. [13] Assuming that the [redacted] did not file a partnership return for the taxable year [redacted], no statute of limitations would preclude the Service from making an assessment. Section 6229(c)(3).

Issue 3. *Whether the Service should assert the delinquency penalty under section 6698.*

Section 6698(a) provides for the imposition of a penalty against a partnership for failure to timely file a complete partnership information return as required by section 6031 and 6072. Section 6698(c) provides that the penalty imposed by section 6698(a) shall be assessed against the partnership. Thus, the section 6698 penalty should not be asserted against the individual partners in this case.

CONCLUSION

The [redacted] appears to be a "partnership" as that word is used in sections 7701(a)(2) and 761(a). Furthermore, the [redacted] appears to be a TEFRA partnership. The section 6698 penalty applies to the partnership and not to the individual partners. Thus, the Service should move to dismiss for lack of jurisdiction the issue involving adjustments attributable to the [redacted] receipt of credit and loss pass-throughs from the [redacted] and should initiate TEFRA audit procedures at the partnership level.

MARLENE GROSS

By: Judith M. Wall
JUDITH M. WALL
Senior Technician Reviewer
Branch No. 2

---

[13] You should ensure that the motion to dismiss does not result in a decision wherein the adjustments attributable to the partnership are res judicata. Forms 7-1 and 7-2 of the Tax Litigation Form Book are useful guides in drafting such a motion.